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MICHAEL RODAK, JR., CLE

IN THE

Supreme Court of the United States

No. 73-797

THE MIAMI HERALD PUBLISHING COMPANY,

Appellant,

v.

PAT L. TORNILLO, JR.,

Appellee.

On Appeal from the Supreme Court of Florida

BRIEF FOR RADIO TELEVISION NEWS DIRECTORS ASSOCIATION, AS AMICUS CURIAE

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This brief is filed with the written consent of the parties, pursuant to Rule 42 of the Court.

INTEREST OF AMICUS CURIAE

The Radio Television News Directors Association (RTNDA) is a non-profit professional organization of journalists. It includes approximately 900 members who are active in the supervision, gathering, reporting and editing of news and other information of public affairs broadcast by the national networks and by local radio and television stations throughout the nation.

RTNDA was a principal party in one of the cases which challenged the legality of the Fairness Doctrine which is applied by the Federal Communications Commission to broadcast station licensees. See *Radio Television News Directors Ass'n v. United States*, 400 F.2d 1002 (7th Cir., 1968), *reversed, sub nom. Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969). This group of journalists has also expressed its views in the pending FCC inquiry proceeding concerning the Fairness Doctrine (FCC Docket No. 19260).

The case at bar raises the question whether the "fairness" compulsion of Section 104.38 of the Florida Statutes, granting a right of reply to political candidates attacked in newspapers, is constitutional. The journalists of RTNDA have a direct and substantial interest in the result and manner in which this case is decided, as explained further in Argument I of this brief.

SUMMARY OF ARGUMENT

The Appellant's Jurisdictional Statement and the supporting briefs of several amici curiae have already stated a persuasive argument that the Florida right-of-reply statute involved in this case violates the First Amendment. Without undertaking to duplicate those points which rest solidly on traditional free-press constitutional principles, RTNDA wishes to join in support of them. Beyond that, RTNDA believes it important to point out in this brief the growing trend of legal opinion against the constitutionality and usefulness of the Fairness Doctrine in broadcasting, and we urge the Court to reject both the effort to extend the "fairness" rationale to newspapers and the invitation to reaffirm the Fairness Doctrine for broadcasting. In

the *CBS* case last term,[1] the Court recognized as never before the broad journalistic discretion of broadcasters, but the Court incorrectly assumed less governmental interference than actually exists in the FCC's enforcement of the Fairness Doctrine.

ARGUMENT

I. REVERSAL IN THIS CASE, WITHOUT REAFFIRMANCE OF THE CONSTITUTIONALITY OF THE FAIRNESS DOCTRINE, IS IMPORTANT TO THE FREEDOM OF THE ELECTRONIC PRESS.

The present case poses a danger not only to newspapers but to broadcast journalism as well. The danger to the latter is two-fold.

First, an affirmance of the Florida court decision would signal the end of traditional free press theory under the First Amendment. Until now, the print media and the public have continued to receive the benefits of that free press theory, even while the broadcast media have been denied those benefits in important respects. The hope of broadcast journalism has been that it would ultimately convince this Court that *Red Lion*[2] was decided wrongly; obviously, this hope would fade and be replaced by despair for a truly free press if the print media were also subjected to the same or similar "fairness" concepts as those fastened upon broadcasting.

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[1] *Columbia Broadcasting System, Inc. v. Democratic National Committee*, 412 U.S. 94 (1973) (hereafter cited as *"CBS"*).

[2] *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

Secondly, there is a danger to broadcast journalism in the position taken by some of the amici curiae which filed briefs earlier. They defended newspapers from a right-of-reply obligation on the grounds that such an obligation can be imposed only on broadcasting because broadcasting is "different" and it is that difference which justified the result in *Red Lion*. RTNDA agrees that in *Red Lion* the Court then *believed* that broadcasting is significantly different for these purposes; it does *not* agree with any implication that this is a correct evaluation and one that can continue to be relied upon to distinguish *Red Lion* from cases like the one at bar.

The danger of such a rationale, if it were adopted by this Court, is that it would harden the holding of *Red Lion* even as knowledgeable FCC officials, jurists and other persons in positions to know the workings of the Fairness Doctrine are questioning the constitutionality of the doctrine. Instead, as we support hereinafter, the Court should promote or at least not foreclose the possibility of an early reexamination of government-imposed fairness in broadcasting, by avoiding any reaffirmation of the validity of *Red Lion* in deciding the instant case. In the long run, this approach would be safer for print media also, because if a favorable Court decision here were based on broadcast media "difference" factors which were later recognized by the Court as being irrelevant and/or often present in the case of newspapers and magazines, the print media would presumably be subject to the same kind of governmental fairness regulation as is broadcasting.

For press freedom's sake, this Court should, in reversing the judgment below, refrain from taking what may appear to be the easy way out offered by those who believe they can serve newspaper freedom by writing off the future freedom of broadcasters. This would be especially tragic

in view of the fact that broadcasting is that part of American journalism which public opinion surveys consistently show is most relied upon by the people of this nation.[3]

II. A GROWING RECOGNITION OF THE VALUE OF TRADITIONAL JOURNALISTIC FREEDOM IN BROADCASTING INDICATES THAT THE CONSTITUTIONAL QUESTION ABOUT THE FAIRNESS DOCTRINE SHOULD BE REEXAMINED, AND, THEREFORE, THE RATIONALE FOR THE DOCTRINE SHOULD NEITHER BE EXTENDED TO NEWSPAPERS NOR REAFFIRMED FOR BROADCASTING.

A. Jurists, FCC officials and other persons knowledgeable about the Fairness Doctrine are increasingly questioning its constitutionality.

Less than five years after receiving this Court's unequivocal blessing in the *Red Lion* case, the Fairness Doctrine is in trouble. Leading jurists and present and former FCC officials who once supported the doctrine are raising questions about its constitutionality and usefulness.

In the *CBS* case last term, Mr. Justice Stewart, who had joined in the Court's opinion in *Red Lion*, associated himself with Mr. Justice Douglas' strong views to the contrary of *Red Lion* and then stated in his own concurring opinion:

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[3] See, *e.g.*, "What People Think of Television and Other Mass Media 1959-1972" (The Roper Organization, Inc., 1973).

> "The First Amendment prohibits the Government from imposing controls upon the press. Private broadcasters are surely part of the press."[4]

Justice Stewart concluded:

> "Those who wrote our First Amendment put their faith in the proposition that a free press is indispensable to a free society. They believed that 'fairness' was far too fragile to be left for a government bureaucracy to accomplish. History has many times confirmed the wisdom of their choice.
>
> "This Court was persuaded in *Red Lion* to accept the Commission's view that a so-called Fairness Doctrine was required by the unique electronic limitations of broadcasting, at least in the then-existing state of the art. Rightly or wrongly, we there decided that broadcasters' First Amendment rights were 'abridgeable.' But surely this does not mean that those rights are nonexistent. And even if all else were in equipoise, and the decision of the issue before us were finally to rest upon First Amendment 'values' alone, I could not agree with the Court of Appeals. For if those 'values' mean anything, they should mean at least this. If we must choose whether editorial decisions are to be made in the free judgment of individual broadcasters, or imposed

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[4] 412 U.S. at 132-33.

by bureaucratic fiat, the choice must be for freedom."[5]

Justice Douglas stated in his concurring opinion in *CBS*:

> "We have . . . witnessed a slow encroachment by government over that segment of the press that is represented by TV and radio licensees. Licensing is necessary for engineering reasons; the spectrum is limited and wavelengths must be assigned to avoid stations interfering with each other. *** The Commission has a duty to encourage a multitude of voices but only in a limited way, *viz:* by preventing monopolistic practices and by promoting technological developments that will open up new channels. But censorship or editing or the screening by government of what licensees may broadcast goes against the grain of the First Amendment.
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> * * * * *
>
> "[T]he regime of federal supervision under the Fairness Doctrine is contrary to our constitutional mandate and makes the broadcast licensee an easy victim of political pressures and reduces him to a timid and submissive segment of the press whose measure of the public interest will now be echoes of the dominant political voice that emerges after every election. The affair with freedom of which we have been proud will now bear only a faint likeness of our former robust days."[6]

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[5] *Id.* at 145-46.

[6] *Id.* at 157-58, 164-65 (footnotes omitted).

While speaking approvingly of the Fairness Doctrine, the majority opinion in *CBS* recognized as never before the importance of a broad journalistic discretion exercised by broadcasters. Mr. Chief Justice Burger wrote:

> "For better or worse, editing is what editors are for; and editing is selection and choice of material. That editors – newspaper or broadcast – can and do abuse this power is beyond doubt, but that is not reason to deny the discretion Congress provided. Calculated risks of abuse are taken in order to preserve higher values. The presence of these risks is nothing new; the authors of the Bill of Rights accepted the reality that these risks were evils for which there was no acceptable remedy other than a spirit of moderation and a sense of responsibility – and civility – on the part of those who exercise the guaranteed freedoms of expression."[7]

Chief Judge Bazelon has raised the questions "whether time and technology have so eroded the necessity for governmental imposition of fairness obligations that the doctrine has come to defeat its purposes in a variety of circumstances" and "whether an alternative does not suggest itself – whether, as with printed press, more freedom of the individual broadcaster would enhance, rather than retard, the public's right to a marketplace of ideas."[8]

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[7] *Id.* at 124-25.

[8] *Brandywine-Main Line Radio, Inc. v. FCC*, 153 U.S.App.D.C. 305, 369, 473 F.2d 16, 80 (1972) (dissenting opinion), *cert. denied*, 412 U.S. 922 (1973). The Supreme Court observed in the *CBS* case, 412 U.S. at 102, that because the broadcast industry is dynamic,

(continued)

Judge Bazelon devoted most of his long opinion in *Brandywine* to questioning the assumptions of the Fairness Doctrine. He stated in part:

> "Our perception of the need for broadcasting regulation has not, in Judge Tamm's words, 'seriously been questioned in over fifty years.' A re-examination of the value, purposes and effects of the fairness doctrine raises for me such serious doubts about the constitutionality of its application here that I am compelled to withhold my affirmance.
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> * * * * *
>
> "[W]e are told today, by highly respected members of the newspaper and broadcasting corps, that governmental regulation of broadcasting has been more pernicious than any group of private censors. Some of the 'chilling' effects of the threat of FCC intervention, which the broadcasters say have operated to suppress discussion of controversial views and ambitious journalism, remain hidden from the public eye. *Red Lion* dismissed this issue as speculative, but this cannot be the final word. Facts can change, and so can our perception of them.

(footnote continued)

"solutions adequate a decade ago are not necessarily so now, and those acceptable today may well be outmoded 10 years hence." See also, *Id.* at 118:

> "To perform its statutory duties, the Commission must oversee without censoring. This suggests something of the difficulty and delicacy of administering the Communications Act – a function calling for flexibility and the capacity to adjust and readjust the regulatory mechanism to meet changing problems and needs."

"Some chilling effects have become quite obvious. In the past years, networks have come under repeated attacks from government spokesmen who did not like the way television reported a variety of hot public issues. These attacks did not focus on inaccuracies, but on the 'bias' or lack of 'fairness' in the presentation. The history of the FCC is itself replete with examples, including *Brandywine* itself, of the controversial viewpoint being screened out in favor of the dreary blandness of a more acceptable opinion. In the context of broadcasting today, our democratic reliance on a truly informed American public is threatened if the overall effect of the fairness doctrine is the very censorship of controversy which it was promulgated to overcome.

* * * * *

"There is no doubt about the unique impact of radio and television. But this fact alone does not justify governmental regulation. In fact, quite the contrary. We should recall that the printed press was the only medium of mass communication in the early days of the Republic – and yet this did not deter our predecessors from passing the First Amendment to prohibit abridgment of its freedoms. If, as has been suggested, we are to focus on the newly acquired role of broadcasting as the 20th century version of the 18th century town meeting or political pamphlet, we must be all the more careful to preserve a 'free press' in the broadcast media. To argue that a more effective press requires a more regulated

> press flies in the face of what history has taught us about the values and purposes of protecting the individual's freedom of speech."[9]

FCC Chairman Dean Burch has had his own doubts about the Fairness Doctrine. In a speech analyzing the opinions of the Court in the *CBS* case, Chairman Burch questioned the "scarcity" rationale for broadcast regulation:

> "***Very candidly, it makes me nervous. (In the final paragraphs of his opinion, it seems to make the Chief Justice a bit nervous too. He speaks of *not* freezing a 'necessarily dynamic process into a constitutional holding' and he refers to the 'advent of cable television' with its potential for greater diversity of competing voices.) There may be very real distinctions to be made between electronic and print journalism in terms of impact and immediacy, but this has nothing to do with 'scarcity'. And neither do the numbers involved – daily newspapers vs. broadcast outlets. I am not quite prepared to rewrite the book, and I have no power to rewrite the Act – but I confess to a growing perplexity about

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[9] 473 F.2d at 64, 77-79 (dissenting opinion) (footnotes, including statements of newsmen, omitted). In this brief we do not directly rely upon statements of newsmen concerning the inhibiting effects of the Fairness Doctrine; this is to avoid any suggestion that any of the opinions quoted here are self-serving or repetitive of the statements made at the time of *Red Lion*. Of course, it is highly pertinent to the theme of the brief that judges, FCC officials, and other legal thinkers have now been persuaded or alarmed by the newsmen's arguments.

> the foundations of the Fairness Doctrine and its role in the regulatory scheme.
>
> "If I had to pick out those lines of *BEM [CBS]* that impress me most, I'd opt for Mr. Justice Stewart's discussion of 'the dangers that beset us when we lose sight of the First Amendment itself, and march forth in blind pursuit of its 'values'."***[10]

Mr. Burch then went on to quote all of that part of Justice Stewart's opinion which is quoted above (pp. 6-7) in this brief. The Chairman closed by stating, "If there's a message in my choice of this closing quotation, I'll leave that for each of you to figure out."[11]

The General Counsel of the FCC, John W. Pettit, has also raised

> ". . . the question of whether the historic justification for the extensive regulation of broadcasting really holds water any more. And more specifically, does the high degree of regulation we impose on radio and TV in comparison with the relative absence of control enjoyed by newspapers and magazines, amount to anything less than invidious discrimination, devoid of any rational basis save the occasional blessing of a Supreme Court majority?

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[10] Remarks of FCC Chairman Dean Burch before the Federal Communications Bar Association, Washington, D.C., June 29, 1973 (FCC News release mimeo. 04297), pp. 4-5.

[11] *Id.* at 6.

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"In view of all this, can we or should we continue to cite the scarcity of broadcast frequencies as justifying the differences in regulatory treatment of electronic and print media, especially when broadcast outlets far outnumber newspapers? And if regulation of broadcasting must be justified as a result of its 'impact' or its 'effect' – as Judge Wright suggests – aren't we coming dangerously close to suggesting that government regulation of speech is particularly warranted when the mode of speech is especially effective? And isn't *that* coming dangerously close to suggesting that free speech for broadcasters can only be allowed if they reject the bold and embrace the bland?***

* * * * *

"How, for example, does the Fairness Doctrine stand without the support of the scarcity rationale? If neither electronic nor print media are really scarce in most parts of the country, why do we care what any given station or newspaper broadcasts or prints? And how can we logically or legally support the idea of a Fairness Doctrine? You heard the answer the Florida court gave. In effect it put the government in the role of guarantor of 'robust and wide-open dissemination of ideas and counterthought.' In other words, in the Florida court's view, the right to *receive information* is paramount, and the best way to assure that this information is diverse and accurate is to insure that

> those who disagree receive a chance to respond. If that's really what the First Amendment means, then the idea of scarcity as a prop is hardly needed. But I'm not so sure that's what the First Amendment is all about, nor am I sure that the First Amendment is fulfilled by saddling the print media with regulatory requirements similar to those fixed upon broadcasters. As a matter of fact, that's precisely the wrong way to redress the existing inequalities in treatment of broadcasters and our friends in the print media. ***"[12]

Henry Geller, a former FCC General Counsel who advised the Commission at the time that it was defending the Fairness Doctrine in the *Red Lion* case, has just argued in an amicus curiae brief that, in its present form, "the FCC's fairness practice violates the statute and the First Amendment."[13] In recent months, two former FCC Chairmen, Paul Porter[14] and E. William Henry,[15] as well

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[12] Remarks of FCC General Counsel John W. Pettit before a Regional Conference of the National Association of Broadcasters, Hartford, Conn., Oct. 16, 1973 (unpublished mimeo.), pp. 3-4, 12-13, 15-16.

[13] Brief Amicus Curiae of Henry Geller, p. 2, *et seq.*, filed Feb. 15, 1974, in *National Broadcasting Co. v. FCC*, D.C. Cir. No. 73-2256, on pet. for review of *Accuracy in Media, Inc.*, FCC 73-1232, released Dec. 3. 1973; FCC 74-57, released Jan. 23, 1974. See also, notes 23, 25, 26 *infra*.

[14] See *Broadcasting* magazine, July 9, 1973, p. 19, col. 2.

[15] See *Id*, Feb. 5, 1973, p. 40, col. 2.

as Sam Ervin, Chairman of the U.S. Senate Judiciary Subcommittee on Constitutional Rights,[16] have challenged or seriously questioned the assumptions underlying the Fairness Doctrine. Circuit Judge J. Skelly Wright is quoted as favoring a cautious approach to the Fairness Doctrine in view of newsmen's claims of the "chilling" effects of government regulation.[17] And a majority of 60 or so conferees – academicians, lawyers, judges, journalists, "public interest" representatives and others – passed resolutions last summer calling for restrictions on government regulation of radio and television programming; "The Conferees placed particular emphasis on the evolved form and substance of the 'Fairness Doctrine' . . . as a serious infringement on freedom of expression under the First Amendment."[18]

While this is by no means an exhaustive review of informed criticism of the Fairness Doctrine, it should be sufficient, we believe, to convince the Court to avoid an unnecessary reaffirmation of the doctrine for broadcasting, as well as an extension of "fairness" theory to newspapers. The Florida statute may be invalidated solely on traditional First Amendment grounds, as argued in other briefs filed in this case. RTNDA also urges the Court to leave the way open in its opinion for an early reexamination of the Fairness Doctrine as applied to broadcasting.

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16 119 Cong. Rec. S 20358-62 (daily ed., Nov. 14, 1973).

17 See *Broadcasting* magazine, July 9, 1973, p. 18, col. 3.

18 "The First Amendment and the News Media," Final Report, Annual Chief Justice Earl Warren Conference on Advocacy in the United States, June 8-9, 1973, Cambridge, Mass. (Sponsored by the Roscoe Pound – American Trial Lawyers Foundation), especially at 21-29.

B. This Court has incorrectly assumed that under the Fairness Doctrine there is less governmental interference in the broadcasters' exercise of journalistic discretion than actually exists.

Another reason that the Court should avoid reaffirming the validity of the Fairness Doctrine in dicta here is because the Court, in favoring the doctrine in the *CBS* case, was apparently unaware of the extent of the FCC's interference in the journalistic decisions of broadcasters.

In *CBS*, the Court stated:

> "By minimizing the difficult problems involved in implementing such a right of access [for paid editorial advertisements], the Court of Appeals failed to come to grips with another problem of critical importance to broadcast regulation and the First Amendment – the risk of an enlargement of government control over the content of broadcast discussion of public issues.***
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> * * * * *
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> "Under a constitutionally commanded and government supervised right-of-access system urged by respondents and mandated by the Court of Appeals, the Commission would be required to oversee far more of the day-to-day operations of broadcasters' conduct, deciding such questions as whether a particular individual or group has had sufficient opportunity to present its viewpoint *and whether a particular viewpoint has already been sufficiently aired.* Regimenting broadcasters is too radical a therapy for the ailment respondents complain of.

> "Under the Fairness Doctrine the Commission's responsibility is to judge whether a licensee's *overall performance* indicates a sustained good faith effort to meet the public interest in being fully and fairly informed. The Commission's responsibilities under a right-of-access system would tend to draw it into a continuing *case-by-case determination* of who should be heard and when.***"[19]

Three justices stated that, "it would be anomalous for us to hold, in the name of promoting the constitutional guarantees of free expression, that the *day-to-day editorial decisions* of broadcast licensees are subject to the kind of restraints urged by respondents.*** Every licensee is already held accountable for the *totality of its performance of public interest obligations.*"[20]

From these and other passages in the opinion of the Chief Justice, it appears that the Court underestimates the degree of case-by-case influence the FCC has upon broadcast licensees in the application of the Fairness Doctrine. The Court is wrong in its emphasis that "[l]icense renewal proceedings, in which the listening public can be heard, are a principal means of such regulation."[21] The principal device of such regulation is case-by-case determination, usually of "whether a particular viewpoint has already been

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[19] *Id.* at 126-27 (emphasis added).

[20] *Id.* at 120-21 (Burger, C.J., joined by Stewart and Rehnquist, JJ.) (emphasis added).

[21] *Id.* at 110.

sufficiently aired." The process starts with a complaint informally considered by a Commission staff employee and may end with full Commission action and perhaps judicial review.[22]

Under this system, many broadcast stations, particularly those with limited financial resources, do not always adhere to their own journalistic judgments in the face of actual or potential complaints to the Commission.[23] Relatively few cases on the application of the Fairness Doctrine reach either the Commission or court, because the station capitulates or compromises at one stage or another of a complaint, perhaps avoiding a foreseeable controversy by "balancing" more – even into blandness – or perhaps by saying nothing at all on an issue. Further, in a close case, a broadcaster may decide to follow the agency's advice, given usually by a Fairness Doctrine "expert" on the FCC staff who is often deferred to by stations and their attorneys.

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22 See, *e.g.*, *NBC* case cited in note 13, *supra*.

23 See the case history of a station which did spend the large sums of money necessary to clear itself of charges of unfairness. Geller, *The Fairness Doctrine in Broadcasting: Problems and Suggested Courses of Action* (Rand Corp. report R-1412-FF, Dec. 1973), pp. 40-42. Geller concludes:

> "Thus the fact that KREM-TV was absolved of all charges does not obviate a significant question: Is the FCC's manner of proceeding, while in good faith in light of substantial issues, nevertheless discouraging the presentation of programming on controversial issues?"

When a complaint is litigated, the agency staff may conduct a "stop-watch" analysis of program content.[24] When the staff review results in an order that more broadcast time be devoted to a contrasting viewpoint, the station will find it tempting and relatively easier to provide the air time, rather than litigate further, no matter how firmly convinced of the reasonableness of its own decision to the contrary. In some cases, because of the imminence of legislative or other action on a controversial issue or election, the Commission will order "prompt compliance" without opportunity for judicial review.[25]

From this it should *not* be inferred that RTNDA would favor adoption of a procedure, as proposed by one former FCC official, which would defer adjudication of fairness

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[24] See, *e.g.*, *Wilderness Society*, 31 F.C.C.2d 729 (1971). In that case, the Commission also demonstrated its willingness to overturn a licensee's judgment on fairness when to do so it had to engage in "a difficult balancing of substantial arguments on both sides" of whether there has been compliance with the Fairness Doctrine. *Id.* at 732. Chairman Burch has stated elsewhere:

> "[T]he letter and spirit of the Fairness Doctrine notwithstanding, there is always the real temptation to cross the line that separates reasonable oversight from outright control – and the mere possibility exerts an influence on both broadcasters and their critics."

Remarks of FCC Chairman Dean Burch, Before the New Orleans Chamber of Commerce, October 5, 1973 (FCC News release, mimeo. 08365), pp. 3-4.

[25] This was the situation in the recent *NBC* case, note 13, *supra*, but on February 14, 1974, the Court of Appeals ordered a stay of that FCC order. The Court heard oral argument on the merits on February 21, 1974, when lawyers and judges delved into the fine points of an award-winning investigative documentary program by NBC. See Geller, *op. cit. supra* note 23, at 38-40.

complaints until consideration of license renewal applications.[26] That procedure without more – preliminary rulings using a much more permissive "reasonableness" standard than articulated and followed thus far – would probably create greater uncertainty and inhibitions in broadcasters than the present system under which the Commission can usually be appeased by prompt rectification or a statutory forfeiture.[27] The foregoing discussion suggests that there may be no way, short of invalidation of the Fairness Doctrine, for the Court to protect "the role of the licensee as a journalistic 'free agent'" who is "only broadly accountable to public interest standards."[28]

Thus, with the problems of the Fairness Doctrine in mind, the Court should refrain from reaffirming it and should be all the more reluctant to extend its theory to the newspaper field.

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[26] Geller, *op. cit. supra* note 23, at 47-53. Moreover, as recognized by Mr. Geller, such a procedure could not be followed with respect to the Personal Attack and Political Editorializing rules, FCC Rules and Regulations, 47 C.F.R. §§73.123, 73.300, 73.598, 73.679. It should be noted that these rules are analogous to the Florida right-of-reply statute at bar, which also would require case-by-case intrusions of government to decide the merits of demands for reply space.

[27] For a case in which license renewal was denied partly on Fairness Doctrine grounds, see *Brandywine-Main Line Radio, Inc.*, 24 F.C.C.2d 18 (1970), 27 F.C.C.2d 565 (1971), *aff'd*, 153 U.S. App.D.C. 305, 475 F.2d 16 (1972), *cert. denied*, 412 U.S. 922 (1973).

[28] *CBS*, 412 U.S. at 117, 120 (Burger, C.J., joined by Stewart and Rehnquist, JJ.).

CONCLUSION

The judgment of the Florida Supreme Court should be reversed, because it and the Florida right-of-reply statute abridge the freedom of the press. This Court should also recognize, with a view toward its own early reexamination of the issue, that the constitutionality of the Fairness Doctrine is being questioned by some of its most knowledgeable former supporters and that there is other evidence that the FCC's enforcement of fairness in broadcast journalism violates the First Amendment.

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